JUN 4 1954
821
HAROLD B. WILLEY, Cle

No. [redacted] 112

In the

Supreme Court of the United States

OCTOBER TERM, 1954

MARK WALDRIP,
Petitioner,

v.

HUDSON SALES CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

HOBERT PRICE,
Attorney for Petitioner.

CLAUDE R. MILLER,
Of Counsel.

WARLICK LAW PRINTING CO. - LAW BRIEF PRINTING - DALLAS - HARWOOD 9350

INDEX

	Page
(a) Reference to Reports	1
(b) Grounds on Which Jurisdiction Invoked	1
(c) Questions Presented	2
First Question	2
Second Question	2
Third Question	3
Fourth Question	3
(d) Statutory Provisions	4
(e) Statement of the Case	4
(g) Basis for Federal Jurisdiction	9
(h) Argument Amplifying Reasons	10
First Reason	10
Second Reason	10
Argument Under First Reason	10
As to the FIRST CONFLICT	10
As to the SECOND CONFLICT	12
As to the THIRD CONFLICT	16
Second Reason—(Restated)	16
Argument Under Second Reason	17
(i) Failure to follow the record	17
(ii) Substitution of Fifth Circuit Findings for Those of the District Court	19
Conclusion	22
Appendix	23-24

Page

Boyd v. Boyd, 252 N. Y. 422, 429, 169 N. E. 632, 634 21

Ford Motor Co. v. United States, 335 U. S. 303, 69 S. Ct. 93, 93 L. Ed. 24 2, 10

Jennings v. Murphy, 194 F. 2d 35, 36 3, 20-A

Pacific Portland Cement Co. v. Food Machinery and Chemical Corp., 178 F. 2d 541 3, 20-A

Pendergrass v. New York Life Ins. Co., 181 F. 2d 136, 138 3, 20

Ring v. Spina (1945), 148 F. 2d 647, 160 A. L. R. 371 2, 12

Standard Oil Co. v. United States (1948), 337 U. S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 3, 16

Timken Roller Bearing Co. v. United States, 71 S. Ct. 971, 341 U. S. 593, 95 L. Ed. 1199 21

United States v. National Association of Real Estate Boards, 70 S. Ct. 711, 339 U. S. 485, 94 L. Ed. 1007 3, 20

United States v. Oregon State Medical Society, 343 U. S. 326, 96 L. Ed. 978, 72 S. Ct. 690 21

United States v. Yellow Cab Co., 70 S. Ct. 177, 338 U. S. 338, 94 L. Ed. 150 3, 19

Wald v. Eagle Indemnity Co., 178 F. 2d 91 3

Windsor Theatre Co. v. Walbrook Amusement Co., 189 F. 2d 797 3

Statutes Cited

Clayton Act, Sec. 3, 38 Stat. 731, 15 U. S. C., Sec. 14 4

Clayton Act, Sec. 4, 38 Stat. 731, 15 U. S. C., Sec. 15 4

Sherman Antitrust Act, 26 Stat. 209; 50 Stat. 693, 15 U. S. C., Sec. 1 4

28 U. S. C. 1254 (1) 2

Other Authorities Cited

Rules of Civil Procedure, Rule 52 3, 19

Revised Rules, Rule 19 (1) (b) 22

No. .....

In the

Supreme Court of the United States

OCTOBER TERM, 1954

MARK WALDRIP,

Petitioner,

v.

HUDSON SALES CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

(a) REFERENCE TO REPORTS

No opinion of the District Court was reported. The opinion of the Circuit Court of Appeals is reported, *211 Fed. 2d 268*, and is appended as pages 344 to 363 of the Record. The Circuit Court opinion recites in full the oral statement of the District Court. (R. 346.)

(b) GROUNDS ON WHICH JURISDICTION INVOKED

The grounds upon which jurisdiction of the Supreme Court is invoked are:

(i) The date of the judgment sought to be reviewed, and the time of its entry is March 5, 1954. (R. 356.)

(ii) The date of the order overruling the petition for rehearing is April 9, 1954. (R. 364.)

(iii) The statutory provision believed to confer upon the Supreme Court jurisdiction to review the judgment or decree in question by writ of certiorari is: *28 U. S. C. 1254 (1).*

(c) QUESTIONS PRESENTED

First Question: Where an automobile manufacturer and distributor use coercion in refusing to renew a dealer's contract, and compel the dealer to trade with one of the conspirators, is this a violation of the anti-trust laws?

[Mr. Justice Frankfurter, in the opinion of *Ford Motor Co. v. United States, 335 U. S. 303, 69 S. Ct. 93, 93 L. Ed. 24,* answers that question "Yes." The Fifth Circuit here answers the question "No."]

Second Question: Where others conspire to place an individual under such economic coercion that he must obey their edict to give up competitive makes of automobiles "as the only feasible method by which he may do business," and he suffers loss thereby, may the individual recover for the loss caused by this conspiracy in restraint of trade?

[The Second Circuit, dealing with a somewhat similar situation in *Ring v. Spina, 148 Fed. 2d 647, 653,* answers this question "Yes." The Fifth Circuit here answers the question "No."]

Third Question: Is there a burden upon the plaintiff in an antitrust action to prove the "ultimate demands of 'public interest' "?

[Mr. Justice Frankfurter, in the opinion of *Standard Oil Co. v. United States, 337 U. S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371*, clearly holds that Section 3 of the Clayton Act " * * * has not left at large for determination in each case the ultimate demands of the 'public interest' * * * ." The Fifth Circuit holds that "an essential to private recovery is a showing of public injury." The conflict is irreconciliable.]

Fourth Question: May the Circuit Court, in a trial *de novo*, substitute its own findings of fact (which are not fully supported by the evidence) for the findings made by the District Court?

[The Fifth Circuit here made findings which are without full support in the evidence, and substitutes these findings for those made by the District Court. The Supreme Court, and various Circuits including the Fifth, have held that even where the evidence would support a conclusion either way, that Rule 52 applies and the appellate court cannot try the case *de novo*.][1]

---

[1]Mr. Justice Jackson so held in *United States v. Yellow Cab. Co., 70 S. Ct. 177, 338 U. S. 338, 94 L. Ed. 150;* Mr. Justice Douglas cites and approves this holding in *United States v. National Association of Real Estate Boards, 70 S. Ct. 711, 339 U. S. 485, 94 L. Ed. 1007;* similar holdings are: Eighth Circuit, *Pendergrass v. New York Life Ins. Co., 181 F. 2d 136, 138;* Seventh Circuit, *Jennings v. Murphy, 194 F. 2d 35, 36;* Ninth Circuit, *Pacific Portland Cement Co. v. Food Machinery and Chemical Corp., 178 F. 2d 541;* Fourth Circuit, *Windsor Theatre Co. v. Walbrook Amusement Co., 189 F. 2d 797;* Fifth Circuit, *Wald v. Eagle Indemnity Co., 178 F. 2d 91.*

(d) STATUTORY PROVISIONS

Sec. 1, *Sherman Antitrust Act*, 26 Stat. 209; 50 Stat. 693.[2]

Sec. 3, *Clayton Act*, 38 Stat. 731.[3]

Sec. 4, *Clayton Act*, 38 Stat. 731.[4]

(e) STATEMENT OF THE CASE

Mark Waldrip, who had been in the automobile business for about twenty-six (26) years, including the years of World War II, when he was automobile adviser with the Eighth Service Command, was a "multiple dealer" of automobiles and home appliances in Denton, Texas, in 1947 and 1948. (R. 82-86.) He was selling Hudson, Willys and Packard automobiles and parts, and Philco home appliances. (R. 82-87.) These facts were well known to the Branch Manager of Hudson Motor Car Company. (R. 87.)

In 1947 and during part of 1948, Hudson Motor Car Company of Detroit, Michigan, had sold its automobiles through a distributor, but on May 7, 1948, Hudson Motor Car Company notified Waldrip that the distributorship contract was to be cancelled, effective July 31, 1948, and thereafter, distribution of Hudson automobiles and parts was to be handled in the area by Hudson Sales Corporation from a zone office in Dallas (R. 291). A new contract was signed between the plaintiff and Hudson Sales Corporation in May of 1948, effective August 1, 1948. (R.

[2] 15 U. S. C., Sec. 1, text in appendix.
[3] 15 U. S. C., Sec. 14, text in appendix.
[4] 15 U. S. C., Sec. 15, text in appendix.

16-29.) At the time this contract of 1948 was made, no complaint was made by any Hudson official as to the other lines. (R. 87.) Waldrip was led to believe that he could keep all lines. (R. 87.)

Shortly after the zone office was established, Hudson Sales' Sales Manager Walter Cogdell, instructed plaintiff to stop using Philco radios on Hudson cars. (R. 88-89.) Soon thereafter, Geo. W. Parker, District Manager for Hudson Sales, threatened plaintiff with the ultimatum, "get rid of Philco by the first of the year or we will get a new dealer." (R. 163.) Plaintiff had an investment of over $33,000.00 in Hudson signs, special tools, parts and automobiles, and was compelled by the economic pressure of his situation to comply with this Hudson Sales demand. Plaintiff used "close-out" advertisements in the local newspaper to sell all Philco merchandise by December 31, 1948. (R. 299-302.)

In 1949, Hudson Sales' District Manager was Charles Heard. He demanded that plaintiff stop selling Willys automobiles, and Wm. Gaston, Zone Manager for Hudson Sales, wrote to plaintiff on June 1, 1949, notifying him that his Hudson dealership contract would not be renewed when it expired on July 31, 1949. (R. 285.) Heard, on June 2, 1949, on a "Hudson Organization Correspondence" form, reported to his superior, Arch Methven, Assistant Zone Manager for Hudson Sales, that Waldrip had called him long distance and "is ready to give up Jeep Line," but this was an intra-company report, and plaintiff was not advised of its content. (R. 273.) In June of 1949, plaintiff

was under the economic pressure of an investment of over $24,000.00 in Hudson signs, special tools, parts and automobiles. (R. 105.) He called at the Zone Office in Dallas, reminded the Zone Manager Gaston that "I gave up Philco for you," and asked what more was required. Gaston replied, "You must dispose of Willys." (R. 99.) Plaintiff asked to be permitted to put forth little effort to sell Willys, so Willys would cancel him as a dealer rather than plaintiff cancelling Willys, and Gaston agreed to re-sign him as a Hudson dealer upon that specific condition. (R. 99.) When plaintiff asked if that was all that would be required of him, he was assured that "Now you are in the automobile business. I will take care of you. Go on back and get to work." (R. 100.) Subsequently, Gaston wrote to plaintiff to apologize about an advertising misunderstanding and stated "after you and I had ironed out our difficulties, I should have notified them * * *." (R. 286, 287.)

In April of 1950, Heard called upon the plaintiff and criticized him for still having Willys automobiles on hand. (R. 106.) The plaintiff replied that Gaston had told him to put forth little effort to sell Willys, and now Heard was complaining because the Willys automobiles were not sold; that he was thus "caught between the rollers." (R. 106.) The plaintiff was told by Heard "unless I got rid of any competing lines, I would not be re-signed, that was definite." (R. 107.) Plaintiff refused because he was in such a situation he could not exist as a Hudson dealer if deprived of other lines. Referring to "Chas. Heard's conversation with you," Gaston sent plaintiff notice on May 31,

1950, that his contract with Hudson would not be re-signed after its termination on July 31, 1950. (R. 288.)

For more than two years, these demands, threats and acts of coercion had been almost continuous. Hudson Sales Corporation's former manager admitted using threats not to re-sign dealers to *coerce* or *compel* the dealer to do what he wanted done. (R. 162.) When Waldrip refused to give up Packard, his last remaining competitive line, Hudson made its contract threat effective and cancelled Waldrip as Hudson dealer.[5] These acts by Hudson were in accordance with a national policy entered into in a conspiracy between Hudson Motor Car Company and Hudson Sales Corporation to restrain trade.[6]

Plaintiff sold out his business in 1950 at a loss of $4,960.28. During 1947 and 1948, when he dealt in Philco, Willys, Hudson and Packard, plaintiff had earned $15,078.70 and $22,451.91, respectively. After being forced by Hudson to drop Philco on December 31, 1948, and as a result of being compelled by Hudson to put forth little effort on Willys after June of 1949, plaintiff earned only $7,010.23 in 1949. As a result of putting forth little effort on Willys and being cancelled as a Hudson dealer effective July 31, 1950, plaintiff lost $7,606.04, which with the loss of $4,960.28 resulting from the sale of his business, made the plaintiff's loss for 1950 total $12,566.32.

---

[5]The "Hudson Organization Correspondence" concerning cancelling Waldrip unless Hudson became "exclusive" is set out in detail in the Record (R. 269-288).

[6]Hudson's national policy is proved by the data from Hudson's files, set out in the Record (R. 230-250).

Waldrip's business experience can be shown from the Record (R. 144):

Year		*Profit*	*Loss*
1947	(Waldrip dealt in Philco, Willys, Hudson and Packard)	$15,078.70	
1948	(Waldrip dealt in Philco, Willys, Hudson and Packard)	22,451.91	
1949	(Compelled by Defendants to drop Philco 12-31-48 and put forth little effort on Willys after June of 1949)	7,010.23	
1950	(Compelled by Defendants to put forth little effort on Willys until July 31, 1950; told by Defendants to drop both Willys and Packard in April, 1950, and CANCELLED as a Hudson dealer July 31, 1950)		$ 7,606.04
	(Compelled to sell business because of Defendants having required him to give up dealing in Philco, Willys and Hudson)		4,960.28
Total Actual LOSS in 1950			$12,566.32
Average earning 1947-1948 (four lines)		$18,765.30	
On average earnings basis, 1949 LOSS was	$18,765.30 — 7,606.04		$11,159.26
On average earnings basis, 1950 LOSS was	$18,765.30 + 12,566.32		$31,331.62
On average earnings basis, total LOSS in 1949 and 1950 was			$42,490.88
District Court reduced PROVED LOSS in 1949 and 1950 to and allowed NOTHING for other LOSSES			$25,000.00
Judgment was threefold the award made, and was for			$75,000.00

Hudson Motor Car Company and Hudson Sales Corporation were both corporations, organized under the laws of Michigan, and were engaged in interstate commerce. Hudson Sales' stock was all owned by Hudson Motor. All directors of Hudson Sales were either officers or directors of Hudson Motor. The two corporations occupied the same

offices and space in Detroit, and many officers and employees worked for both corporations, without distinction as to when they were working for one or the other. Salaries of these common officers and employees were prorated between the two corporations. (R. 179-187, 289.)

The testimony and exhibits offered in the District Court show that Hudson Motor and Hudson Sales used threats, coercion and acts of intimidation to take advantage of the economic pressure being exerted upon plaintiff because of his investment in Hudson signs, special tools, parts and automobiles, to compel plaintiff not to sell the commodities of competitors of Hudson Motor and Hudson Sales.

That these continuing acts of conspiracy constituted coercion which substantially lessened competition was undisputed. The three witnesses who testified to the competitive advantage to Hudson to eliminate Willys and Packard from the Denton, Texas, market were the former distributor for Hudson Motor Car Company, the former Zone Manager for Packard, and the plaintiff (R. 177, 157, 113). There is no evidence in the record to dispute the testimony of these three witnesses on this vital point.

Upon this showing, the District Court made findings of fact and entered judgment for the plaintiff. (R. 217, 78.)

(g) BASIS FOR FEDERAL JURISDICTION

This is a controversy between a citizen of Texas and two corporations organized under the laws of Michigan. The amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

(h) ARGUMENT AMPLIFYING REASONS

The petitioner respectfully specifies the following reasons why the writ should be granted, and offers brief arguments in support thereof.

First Reason. The Fifth Circuit has decided the federal question concerning violations of the antitrust statutes in conflict with the decisions of other courts of appeals on the same matter, and has decided a federal question in conflict with applicable decisions of the Supreme Court. (Germane to First, Second and Third "Questions Presented" *supra.)*

Second Reason. The Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, as to call for the Supreme Court's power of supervision, in that, the Fifth Circuit has, in a trial *de novo*, substituted its own findings of fact (which are not fully supported by the evidence) for the findings made by the District Court. (Germane to the Fourth "Question Presented" *supra.)*

ARGUMENT UNDER FIRST REASON

This decision by the Fifth Circuit seems to be in conflict with holdings by the Supreme Court and other Circuits on at least three points.

As to the FIRST CONFLICT: The Supreme Court, in *Ford Motor Co. v. United States, 335 U. S. 303, 69 S. Ct. 93, 93 L. Ed. 24,* defines antitrust violation as

> "Cancellation of a dealer's contract, or refusal to renew it, * * * as a means of influencing dealers to use G. M. A. C., all of which fall within the common

> understanding of coercion * * *." *(U. S. 317, L. Ed. 36.)*

The Fifth Circuit here, at page 274 (R. 354) holds to the contrary, as follows:

> "Plaintiff had no tenure, no right to renewal of his contract as master dealer. Defendant, on the other hand, had an absolute right either to renew or not to renew it, and the exercise by it of that right did not, it could not form the basis of a suit under Section 15, even if the evidence had shown, which it did not, that the defendant had done so only because plaintiff had refused to give up in the future his other agencies and center his efforts on, and give his undivided attention to, Hudson and Hudson products."

It appears to petitioner that this is an absolute conflict.

In the *Ford* case, reference is being made to General Motors threatening contract cancellation or failure of renewal as a means to compel their dealers to finance through General Motors' subsidiary, G. M. A. C., instead of through competitive finance sources. Here, reference is to the threats of failure of renewal of a dealer's contract to compel him to discontinue selling competitive automobiles.

Here the trial court found as a fact that the plaintiff was required by the Hudson Sales Corporation and the Hudson Motor Car Company, acting together, through a common ownership, common officers, directors and employees, to give up the dealing in Willys and Packard automobiles and the Philco apparatus, and that this restriction was in violation of the antitrust statutes. (R. 217.)

As to the SECOND CONFLICT: The Second Circuit, in *Ring v. Spina, 148 F. 2d 647*, considers a situation where an individual, having invested substantial sums of money, was compelled to sign a "Basic Agreement" that was monopolistic in character; finds that such an individual was a victim who could recover treble damages under the Sherman Act upon a showing that economic coercion had been brought to bear to such an extent that he had no alternatives except to submit to the compulsion or lose his entire investment.

Here Waldrip was in an almost identical situation. Waldrip had been a multiple dealer, selling Hudson, Willys, and Packard automobiles, and Philco apparatus. He had $24,529.04 invested in Hudson tools and equipment. (R. 105.) On May 7, 1948, Hudson Motor Car Company addressed a letter to Waldrip's Sales and Service, advising that:

> "Effective July 31, 1948 * * * the distribution of cars and parts in the area in which you are located will be handled by Hudson Sales Corporation."

Although the Hudson officials had known he was selling competing lines, no complaint was made until Waldrip signed the new dealer contract. (R. 87.) Immediately after the new contract was signed in May, 1948, the Zone Manager and Parts Sales Manager for Hudson Sales Corporation began using pressure upon Waldrip to discontinue the Philco line, and stop using Philco radios on Hudson automobiles. (R. 89.)

The Hudson District Manager, George Parker, threatened cancellation of the Hudson dealer's contract if Waldrip did not give up Philco by December 31, 1948. (R. 89.) Parker was a witness at this trial, and freely admitted using this coercion upon Waldrip, as follows:

> "(By Mr. Miller):
>
> "Q. May I, I don't want to transgress the Court's rulings, I want to ask Mr. Parker, if you ever used the threat of cancellation of the Hudson dealership, or, that is, failure to re-sign a contract with Mark Waldrip, in compelling him to do the things that you had been told to have him do about this Philco line?
>
> * * * * *
>
> "A. Yes, I told Mr. Waldrip that he would have to move, or get rid of his Philco line by the first of the year, or we would have to get a new dealer." (R. 163.)

Parker further testified that:

> "A. Well, that would depend, if a dealer was not operating as the Hudson Sales Organization wanted him to operate, such as having an adequate sales organization, or, carry an adequate supply of stock, and things of that sort, we used to use the contract, or the sales agreement, as a sort of wedge, to get him to do it." (R. 162.)

Hudson Sales' own records prove conclusively that the only true basis of Hudson's complaint was Waldrip's handling competing products:

> "District Manager of Hudson Sales Memo to Assistant Zone Manager)
>
> "5/31/49 * * * I am of the opinion Mr. Waldrip has too many lines, Hudson, Packard & Jeep. Hudson should be exclusive * * *." (R. 272.)

"(Zone Manager to Sales Manager Hudson Sales)

"May 12, 1950 * * * In addition to our line, this dealer handles Packard and Willys and does not have sufficient money to buy cars from us nor to enter into our program * * *." (R. 278.)

"(Assistant Zone Manager directive to Hudson Sales District Manager)

"Date 4/21/50. Dealer Action Sheet. **Action Required Dispose of all but our line of automobiles.** (R. 274.) (Emphasis supplied.)

"(Zone Manager of Hudson Sales to Hudson Motor Car Company)

"Aug. 7, 1950 * * * Detailed Reason For Cancellation (of Waldrip) * * * In addition to Hudsons, dealer also handles Pack and Willys. Does not have sufficient funds to buy cars from us or enter into our programs.

"Did Dealer take on another line? — If so, What Line? Has Packard & Jeep

"What efforts were made to hold dealer?

"Every effort was made to assist this dealer but he is just spread too thin to handle three lines of cars, and would not consider giving up either of the other lines

Reported by W. G. Gaston,

Signature."
(R. 285.)

While Hudson's inter-communications made reference to other alleged shortcomings of Waldrip's place of business, it is apparent from Hudson's own records that Waldrip was meeting his sales quota "100%" on January 6, 1950. (R. 308.) The very Assistant Zone Manager who issued

the directive to "Dispose of all but our line of Cars" (R. 274) testified at this trial that Waldrip's facilities were adequate for handling the three lines of automobiles and household appliances. (R. 167.)

The Zone Manager for Hudson Sales Corporation on August 16, 1950, immediately after termination of Waldrip's contract, stated in a letter to Mr. Waldrip:

> "As stated in the letter, this is no reflection in any way or form concerning your credit standing because over the period of time you have been operating under the Hudson Sales Corporation, your account has been handled with promptness and alacrity." (R. 312.)

In the light of these facts, the Fifth Circuit here seems to see no economic compulsion, but holds that "having first endeavored to induce plaintiff to produce more worthwhile results, and having found that plaintiff was unable or unwilling to give it the satisfactory service it was entitled to, defendant did not terminate his contract but at its termination according to its terms simply declined to renew it." *(211 F. 2d 273.)* (R. 354.)

The Fifth Circuit failed to explain how a dealer with good credit, who was selling "100%" of his sales quota, was not giving satisfactory service. The Fifth Circuit makes no mention of the long list of exhibits in the record which allude to "giving up all but our line of automobiles" and to making Hudson "exclusive."

There appears to be an irreconciliable conflict between these holdings by the Second Circuit in the *Ring* case and the Fifth Circuit as to Waldrip.

As to the THIRD CONFLICT: The Supreme Court held in *Standard Oil Co. v. United States, 337 U. S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371,* that Section 3 of the Clayton Act " * * * has not left at large for determination in each case the ultimate demands of the 'public interest' * * *." The whole subject is discussed there in relationship to the historic background. Apparently in direct conflict with that decision of the Supreme Court, the Fifth Circuit has held here that "an essential to a private recovery is a showing of a public injury." *(211 F. 2d 271.)* (R. 347.)

While a showing of public injury was made here, by showing through the testimony of three witnesses that competition had been lessened and trade restricted by Hudson's acts, the Fifth Circuit apparently ignores this portion of the record. (R. 177, 157, 113.)

Second Reason— (Restated)—The Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, as to call for the Supreme Court's power of supervision, in that, the Fifth Circuit has, in a trial *de novo,* substituted its own findings of fact (which are not fully supported by the evidence) for the findings made by the District Court. (Germane to the Fourth "Question Presented" *supra.)*

ARGUMENT UNDER SECOND REASON

(i) Failure to Follow the Record

At the outset, petitioner would show that some of the statements made by the Circuit Court (p. 273) are not supported by the record.[7]

Petitioner is unable to find any reference anywhere in the record to Hudson having a policy that it would permit its dealers to handle other lines, along with Hudson, if they had "the capacity, the facilities, and the *get-up* and *know-how* to adequately handle the Hudson products along with the others." (Emphasis supplied.) The evidence on this point is found in Exhibits 1 through 6 (R. 230-249). These Hudson interoffice communications show a careful attempt to hide the true purpose, but throughout is the theme:

> "Effective immediately, distributor will not grant permission to any dealer to take on a competitive line of cars or trucks." (R. 233.)

The granting of permission for permitting of dual dealerships was to be confined "*almost invariably to thinly populated rural areas.*" (R. 233.) (Emphasis supplied.) A dual dealership would be permitted only if "non-competitive." (R. 243.)

The record at no point makes reference to Hudson's policy of permitting a dual dealership upon the basis stated

[7]The Fifth Circuit's opinion states, in part, at page 272 (R. 351):

"* * * that this policy was that no new contracts would be made and no old ones renewed with master dealers, such as plaintiff, who handled other lines except upon a clear showing that they had the capacity, the facilities, and the get-up and know-how to adequately handle the Hudson products along with the others."

in the Fifth Circuit's opinion of "get-up and know-how." That terminology and the whole concept concerning it seems to be original with the Fifth Circuit.

Furthermore, the record does not support the findings of fact which the Fifth Circuit made in its opinion and substituted for the findings of the District Court.[8] There is nothing in the record to show that Hudson "having first endeavored to induce plaintiff to produce more worthwhile results, and having found that plaintiff was unable or unwilling to give it the satisfactory service it was entitled to, defendant did not terminate his contract but at its termination according to its terms simply declined to renew it."

The record is undisputed that Waldrip had good credit and was meeting his sales quota "100%." (R. 312, 308.)

By Hudson's own records, Waldrip suffered "cancellation" of his contract. Hudson's own records show the "Detailed Reason for Cancellation" was "dealer also handles Pack and Willys." (R. 285.)

By Hudson's own records, the "Action Required" was "give up all but our line of automobiles." (R. 274.) Failure to comply brought a letter stating specifically "In accord-

---

[8]The Circuit Court, at page 273 (R. 353):

"Finally, the only findings that this record would reasonably support are: that, acting on business considerations, defendant determined that plaintiff was too spread out, his efforts too dispersed, to give Hudson the effective representation of master dealer in his territory to which Hudson was entitled; that it did this under its policy, which was not in purpose or effect a violation of any law, to select master dealers who would best serve Hudson's interest; and that, having first endeavored to induce plaintiff to produce more worthwhile results, and having found that plaintiff was unable or unwilling to give it the satisfactory service it was entitled to, defendant did not terminate his contract but at its termination according to its terms simply declined to renew it."

ance with Mr. Heard's conversation with you (when the 'action required' demand was made) * * * it is not our intention to sign a new master dealer's sales agreement with you." (R. 285.)

In the light of these record references it is respectfully submitted that the Fifth Circuit erred in its holding as to the "only findings the record would reasonably support."

(ii) Substitution of Fifth Circuit's Findings for Those of District Court

Aside from the errors the Fifth Circuit made in failing to confine itself to the evidence that was in the record, the **fundamental basis** of this second reason for granting the writ is that the Fifth Circuit had no legal right to consider this a trial *de novo* and substitute its own findings of fact for those made by the District Court. This departure from the usual course of judicial proceedings calls for the Supreme Court's power of supervision.

While the Fifth Circuit brands the District Court's findings as "clearly erroneous," no attempt is made to show that the District Court's findings were not supported by the record.

It has been held by the Supreme Court that Rule 52 applies to appeals by the Government, and precludes the Supreme Court from trying *de novo* such findings as to "intent, motive and design" in antitrust cases. *United States v. Yellow Cab Company, 70 S. Ct. 177, 338 U. S. 338, 94 L. Ed. 150.* The *Yellow Cab* opinion was cited and approved

in *United States v. National Association of Real Estate Boards, 70 S. Ct. 711, 339 U. S. 485, 94 L. Ed. 1007,* holding that the Supreme Court does not have the choice of giving the facts another construction than that given by the District Court. The Fifth Circuit here assumed the right to choose a different construction as to the "only findings this record would reasonably support," and then proceeded to consider the intent, motive and design in this antitrust suit by determining that Hudson's policy was not "in purpose or effect a violation of any law." (R. 353.)

The Eighth Circuit held, in *Pendergrass v. New York Life Ins. Co., 181 F. 2d 136,* that the findings of fact of a trial judge would not be set aside unless unsupported by substantial evidence, since the existence of any doubt as to whether the trial court or the circuit court is the ultimate trier of fact issues in non-jury cases is detrimental to the orderly administration of Justice.[9]

---

[9]At page 138, that opinion states:

"There is no logical reason for placing the findings of fact of a trial judge upon a substantially lower level of conclusiveness than the fact findings of a jury of laymen, or those of an administrative agency, which may be set aside only if unsupported by substantial evidence. The findings of fact of a trial court should be accepted by this Court as being correct unless it can be clearly demonstrated that they are without adequate evidentiary support or were induced by an erroneous view of the law. The entire responsibility for deciding doubtful fact questions in a non-jury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in non-jury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases."

See also: *Jennings v. Murphy, Seventh Circuit, 194 F. 2d 35, 36; Pacific Portland Cement Co. v. Food Machinery and Chemical Corp., Fourth Circuit, 178 F. 2d 541.* Dozens of other cases containing similar holdings could be cited.

Mr. Justice Black, in *Timken Roller Bearing Company v. United States, 71 S. Ct. 971, 341 U. S. 593, 95 L. Ed. 1199*, reiterated that cases are not to be tried *de novo* on appeal, and accepted the trial judge's findings. The test fixed by Mr. Justice Jackson in *United States v. Oregon State Medical Society, 343 U. S. 326, 96 L. Ed. 978, 72 S. Ct. 690*, as to whether or not findings are "clearly erroneous" is whether they leave the Supreme Court with a

> "definite and firm conviction that a mistake has been made."

There Mr. Justice Jackson quotes with approval the New York Court of Appeals' recognition of the advantageous position of the trier of facts to ascertain the truth in doubtful cases. [10]

It is respectfully submitted that the Fifth Circuit here has departed from judicial precedent. There is no statement in the opinion that the appellate court has a definite and firm conviction that a mistake has been made. There is no statement in the opinion that there was not substantial evidence to support the District Judge's findings as to Hudson Sales Corporation's violation of the antitrust laws.

---

[10] At page 988, that opinion states:

"The Government's contentions have been plausibly and earnestly argued but the record does not leave us with any 'definite and firm conviction that a mistake has been committed.'

"As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. * * * How can we say the judge was wrong? We never saw the witnesses * * *. To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd v. Boyd, 252 N. Y. 422, 429, 169 N. E. 632, 634.*"

In fact, the Fifth Circuit's departure from judicial precedent is not confined to mere failure to follow the rule of law as repeatedly pronounced by the Supreme Court and other appellate courts; here the Fifth Circuit has actively projected itself into the litigation as the trier of facts, has constituted this a complete trial *de novo*, and has substituted its own findings of fact for those made by the District Court. Such a departure appears to call for the exercise of this Court's supervision as provided for in Rule 19 (1) (b) of the Revised Rules effective July 1, 1954.

CONCLUSION

In the light of the important questions of federal law here involved, the conflicts between this decision and those of the Supreme Court and other Circuits, and the departure from accepted judicial proceedings in the trying *de novo* of a case in the appellate court, the petitioner respectfully submits that a writ of certiorari should issue herein to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

.....

HOBERT PRICE,
Attorney for Petitioner.

CLAUDE R. MILLER,
Of Counsel.

APPENDIX

Title 15—United States Code Annotated

Sec. 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment but not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, Sec. 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693."

APPENDIX

Title 15—United States Code Annotated

Sec. 14. Sale, etc., on agreement not to use goods of competitor

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, Sec. 3, 38 Stat. 731."

Sec. 15. Suits by persons injured; amount of recovery

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731."

FILED
JUL 16 1954
HAROLD B. WILLEY, Cl

In the

Supreme Court of the United States

OCTOBER TERM, 1954

No. 112

MARK WALDRIP,

Petitioner,

v.

HUDSON SALES CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals, Fifth Circuit

BRIEF FOR RESPONDENT

JOHN W. RUTLAND, JR.,
1801 Republic Bank Building,
1309 Main Street,
Dallas 1, Texas,
Attorney for Respondent.

Of Counsel:
DANIEL R. ROGERS,
THOMPSON, KNIGHT, WRIGHT & SIMMONS,
1801 Republic Bank Building,
1309 Main Street,
Dallas 1, Texas.

RICHARD W. LARWIN,
BEAUMONT, SMITH & HARRIS,
Ford Building,
Detroit 26, Michigan.

WARLICK LAW PRINTING CO. - LAW BRIEF PRINTING - DALLAS - HARWOOD 9350

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Summary of Argument	5
Argument and Authorities	6
A. There Is no Conflict; Petitioner's Cases Distinguished	6
1. Ford Motor Company v. United States of America, 335 U. S. 303. (1948)	6
2. Ring v. Spina, 148 F. 2d 647, 160 A. L. R. 371. (C. A. 2—1945)	9
3. Standard Oil Company of California, et al., v. United States, 337 U. S. 293. (1949)	11
B. The Action of the Court of Appeals was Proper	13
Conclusion	15
Appendix	19-21

CITATIONS

Cases:

	Page
Ford Motor Company v. United States of America, 335 U. S. 303. (1948)	2, 6
General Pictures Co. v. Western Electric Co., 304 U. S. 175, 178. (1938)	14
Layne & Co. v. Western Well Works, 261 U. S. 387, 393. (1923)	14
Magnum Co. v. Coty, 262 U. S. 159, 163 (1923)	14
Reinstine v. Rosenfield, et al., 111 F. 2d 892 (C. A. 7—1940)	14
Ring v. Spina, 148 F. 2d 647, 160 A. L. R. 371. (C. A. 2—1945)	2, 9
Standard Oil Company of California, et al. v. United States of America, 337 U. S. 293 (1949)	2, 11
State Farm Mutual Automobile Ins. Co. v. Bonacci, et al., 111 F. 2d 412 (C. A. 8—1940)	14
United States v. General Motors Corporation, 26 F. Supp. 353, 121 F. 2d 376, cert. den. 314 U. S. 618, reh. den. 314 U. S. 710	6
United States v. Yellow Cab Co., 338 U. S. 338, 340 (1949)	14

Statutes:

Clayton Act, Sec. 3, 38 Stat. 731, 15 U. S. C. Sec. 14	11, 20
Clayton Act, Sec. 4, 38 Stat. 731, 15 U. S. C. Sec. 15	20
Sherman Antitrust Act, 26 Stat. 209; 50 Stat. 693, 15 U. S. C., Sec. 1	19
Federal Rules of Civil Procedure, Rule 52(a)	4, 14, 21

In the

Supreme Court of the United States

OCTOBER TERM, 1954

No. 112

MARK WALDRIP,

Petitioner,

v.

HUDSON SALES CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals, Fifth Circuit

---

BRIEF FOR RESPONDENT

I.

OPINIONS BELOW

The District Court's oral opinion was not reported but is set out in full in the opinion of the Court of Appeals (R. 345-346).

The opinion of the Court of Appeals is reported at *211 F. 2d 268.* (R. 343-353).

II.

JURISDICTION

The judgment of the Court of Appeals was entered on March 5, 1954. (R. 354). The order overruling the petition for rehearing was entered on April 9, 1954. (R. 362).

Petitioner seeks to invoke the jurisdiction of this court under *28 U. S. C. 1254 (1).*

III.

QUESTIONS PRESENTED

A. Whether the decision of the Court of Appeals conflicts with the following cases:

1. *Ford Motor Company v. United States of America, 335 U. S. 303. (1948).*
2. *Ring v. Spina, 148 F. 2d 647, 160 A. L. R. 371. (C. A. 2—1945).*
3. *Standard Oil Company of California, et al. v. United States of America, 337 U. S. 293. (1949).*

B. Whether the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to require the exercise of the Supreme Court's powers of supervision.

IV.

STATEMENT OF THE CASE

Respondent rejects petitioner's Statement of the Case in which petitioner purports to summarize the evidence. The purported summary is grossly misleading and inconsistent with the evidence, much of which is documentary. Since respondent believes that consideration of the inferences which may be reasonably drawn from the evidence is not essential to the disposition of the instant application, and that only by a radical departure from the rules can respondent include here an analysis of the evidence to demonstrate the misleading nature of petitioner's statement, respondent will forego any such analysis.

The following statement is substituted for that of petitioner:

Petitioner, Mark Waldrip, a former automobile and appliance dealer in Denton, Texas, filed suit in July of 1951, against respondent Hudson Sales Corporation and the Hudson Motor Car Company in the District Court for the Northern District of Texas. (For reasons not material here, the suit was dismissed without prejudice, and was later refiled.) The complaint alleged fraud, and in the alternative, violation of the Anti-Trust Acts of July 2, 1890, and October 15, 1914, as amended, and sought the recovery of damages, treble damages, costs and attorneys' fees. (R. 1-7; 45-58).

After trial before the court without a jury, the District Judge announced his brief oral opinion as follows:

> "I find as facts, Gentlemen, that the plaintiff was required, by the Hudson Sales Corporation, and, the Hudson Motor Car Company, acting together, through a common ownership, and, common officers, directors, and, employees, to give up the dealing in Willys, and, Packard, and, the Philco apparatus, and, in the place of Philco, putting the Philcos upon the Hudson cars, to use the Hudson apparatus upon Hudson cars.
>
> "I find that that restriction was in violation of the Anti-Trust Statute, and, that that statute is compensatory, and, punitive.
>
> "And, I find that by reason of that, the plaintiff was damaged in the sum of $75,000.00.
>
> "And, I fix the attorney's fees at $7,500.00, or, a total amount of $82,500.00." (R. 217-218).

Without making any other findings of fact or conclusions of law, the District Judge, on Jan. 23, 1953, rendered judgment in favor of petitioner and against respondent for $75,000 plus $7,500 attorneys' fees, interest and costs. (R. 78-79). As against the Hudson Motor Car Company, the suit was dismissed with prejudice to petitioner (R. 79), and that company is not a party to the appeal.

Respondent appealed to the Court of Appeals asserting:

First: that the District Court's findings of fact failed to meet the requirements of Rule 52 (a) of the Federal Rules of Civil Procedure and were not sufficient to support the judgment; and

Second: that the evidence did not afford a substantial basis for the findings made by the District Court, and that the findings, and the judgment based thereon, were clearly erroneous. (R. 346).

The Court of Appeals agreed with respondent on both contentions, and because there was no basis in the evidence for permitting a judgment for petitioner against respondent upon further proceedings, reversed the judgment of the District Court and rendered judgment for respondent. (R. 349-350; 353).

Petitioner's motion for rehearing was overruled (R. 362) and the Petition for Writ of Certiorari was filed.

V.

SUMMARY OF ARGUMENT

Petitioner contends that certiorari should be granted, on the grounds that the decision of the Court of Appeals conflicts with a decision of another Court of Appeals and with two decisions of the Supreme Court and that the Court of Appeals has so far departed from the accepted course of judicial proceedings in deciding the instant case as to call for the exercise of the Supreme Court's powers of supervision. (Pet. 10).

Respondent asserts that there is no conflict as alleged between the decision of the Court of Appeals in the instant case and the cases cited by petitioner. Moreover, respondent maintains that the Court of Appeals was duty-bound to review the evidence and the findings of fact; also, that the

action of the Court of Appeals, in reversing the District Court's judgment on the grounds that the findings of fact were clearly erroneous, and insufficient, and that the judgment was not supported by substantial evidence, was entirely proper.

VI.

ARGUMENT AND AUTHORITIES

A. There Is no Conflict; Petitioner's Cases Distinguished.

1. *Ford Motor Company v. United States of America, 335 U. S. 303. (1948).*

Petitioner asserts that an absolute conflict exists between the *Ford* case and the Court of Appeals opinion in the instant case. That contention is based upon the comparison of a single statement in the *Ford* case with a similarly isolated statement by the Court of Appeals.

In the *Ford* case the Court said that a trial court's instructions to the jury (See *United States v. General Motors Corporation, 26 F. Supp. 353, 121 F. 2d 376, cert. den. 314 U. S. 618, reh. den. 314 U. S. 710)* had the effect of drawing a line between:

> " * * * such practices as cancellation of a dealer's contract, or refusal to renew it, or discrimination in the shipment of automobiles, as a means of influencing dealers to use GMAC, all of which fall within the common understanding of 'coercion,' and other practices for which 'persuasion,' 'exposition' or 'argument' are fair characterizations." *(335 U. S. 316, 317).*

. . .

The Court of Appeals, in the light of its review of the record in the instant case, stated:

> "Plaintiff had no tenure, no right to a renewal of his contract as master dealer. Defendant, on the other hand, had an absolute right either to renew or not to renew it, and the exercise by it of that right did not, it could not form the basis of a suit under Section 15, even if the evidence had shown, which it did not, that the defendant had done so only because plaintiff had refused to give up in the future his other agencies and center his efforts on, and give his undivided attention to, Hudson and Hudson products." (R. 352).

Any apparent conflict between the two statements, when considered out of context, disappears upon examination of the facts of the cases.

The *Ford* case was one phase of one of a number of cases (cited at *335 U. S. 303, 305)* brought by the Government against the three largest automobile companies. The Government, by both criminal and civil actions, attacked the general practices of those companies in coercing their dealers, as a condition to the renewal and maintenance of their dealerships, to finance, and to require the buying public to finance, the purchase of new cars through finance companies affiliated with the manufacturers.

The principal question before the court in the *Ford* case was whether certain restraints, imposed by consent decrees which had been entered in equity suits brought by the Government, should be relaxed. The restraints were conditioned upon the result of litigation between the Government and General Motors and its affiliated companies.

To determine what practices of General Motors were condemned by a verdict of "guilty," the Supreme Court pointed, in the *Ford* case, to the distinction made by the trial judge in the *General Motors* case between such practices as cancellation and refusal to renew which constitute "coercion" and other practices which constitute "persuasion" or "exposition."

If, for the sake of argument, it is considered that the distinction between those practices amounts to a Supreme Court holding that cancellation or refusal to renew constitutes "coercion," still no conflict is shown. In the first place, neither the trial court nor the Court of Appeals found coercive cancellation or refusal to renew in the instant case. In the second place, neither the statement quoted from the *Ford* case, nor any other statement made by the Supreme Court, says that cancellation or refusal to renew an automobile dealer's contract *ipso facto* constitutes an anti-trust violation. Indeed, the instructions of the trial court quoted in the *Ford* case, after making the distinction between coercion and persuasion, went to to state as follows:

> "You must remember that, after all, this coercion, if you find that coercion exists, then the ultimate question is; Has that resulted in unreasonable restraint of interstate commerce?" *(335 U. S. 318).*

When the *General Motors* case, referred to in the *Ford* case, is considered in the light of the facts there presented, it is seen that it stands for the proposition that a leading automobile company violates the Sherman Act, when, pur-

suant to a conspiracy, and as a general practice, it requires a great many dealers to use, and to compel the purchasing public to use, a designated finance service under threat of cancellation or refusal to renew dealer contracts, with resulting unreasonable restraint of interstate commerce.

In the instant case the Court of Appeals held that there was no evidence of a public injury in the form of any unreasonable restrain of trade, and no policy or purpose of respondent in contravention of the anti-trust laws (R. 350-351), and therefore held that the failure of respondent to renew petitioner's contract could not form the basis of a recovery for violation of the anti-trust laws.

The Supreme Court stated in the *Ford* case that the refusal to renew a contract could constitute coercion but did not hold that coercion alone constitutes a violation of the anti-trust laws. The trial court in the instant case did not find coercive refusal to renew a contract and the Court of Appeals simply held that the refusal to renew petitioner's contract under the facts presented, and in the absence of a public injury, did not constitute a violation of the anti-trust laws. There is no conflict between these positions.

2. *Ring v. Spina, 148 F. 2d 647, 160 A. L. R. 371. C. A. 2—1945).*

The allegations of the complaint in the *Ring* case were to the effect that the plaintiff, to protect an investment in a certain play, was required to sign a "Basic Agreement"

with a Dramatist's Guild which was an association including "substantially all the playwrights in the country." The Guild contract, among other things, fixed the minimum terms under which the Guild members could work, and prohibited members from contracting with persons not members of the Guild in good standing. Plaintiff alleged that he was damaged by reason of his inability to produce the play because of the Guild's insistence that he perform under the monopolistic contract.

In holding that the District Court erred in refusing to enjoin the Guild from interfering with the plaintiff's play and from enforcing the "Basic Agreement," the Second Circuit said at page 650:

> "Plaintiff attacks the Basic Agreement for its provisions for compulsory arbitration, for price fixing, and for dealing with only Guild members. It is now well settled that a contract covering a large part of an industry will be void and illegal under the Sherman Act for such restrictive agreements and that these constitute adequate proof of a combination in restraint of trade * * * The agreement also forbids outright sale of radio, television, and other subsidiary rights in the play prior to its stage presentation; * * * These and similar provisions in the Basic Agreement indicate an attempt to control the industry; and the affidavit of Richard Rodgers, president of the Guild, tends to admit that such is the purpose of the organization. We think we must hold that there is a showing prima facie of an agreement in restraint of trade. We need not go further at this time before a trial has established the extent of the restraint, except perhaps to suggest that, in view of the repeated statement by the Supreme Court that a 'price-fixing combination' is

> 'illegal per se under the Sherman Act' * * *, it is difficult for us to see now how this Basic Agreement can be upheld, at least in its entirety."

The *Ring* case is distinguishable from the instant case in that the court was there dealing with a "Basic Agreement" designed to control the major part of an entire industry through price-fixing, a practice illegal *per se* under the Sherman Act, and other unlawful practices.

Therefore, the holding of the *Ring* case is that a *prima facie* showing of an anti-trust violation by the use of an illegal "Basic Agreement," affecting substantially all of an industry, prohibiting contracts between members and non-members, and fixing the prices for which the services of the members could be sold, constitutes a proper basis for a temporary injunction restraining the illegal practices pending trial on the merits. The holding in the instant case is that the refusal to renew an automobile dealer's contract, when not motivated by any intent or purpose to violate the anti-trust acts, when done pursuant to good business policy, and when unattended by any substantial restraint of trade, does not constitute a violation of the anti-trust laws. There is no conflict between these decisions.

3. *Standard Oil Company of California, et al. v. United States, 337 U. S. 293. (1949).*

Petitioner's final claim of conflict is that the Court of Appeals in the instant case has ignored the statement of the Supreme Court in the *Standard Oil* case that Section 3 of the Clayton Act "has not left at large for determination

in each case the ultimate demands of the public interest." (Pet. 16).

The Government in the *Standard Oil* case attacked the widespread use of exclusive dealer contracts by the defendant company, and, in support of its claim that the contracts substantially lessened competition, showed that about 8,000 contracts were involved affecting a gross business of 58 million dollars, comprising 6.7% of the total gasoline business in a seven-state area. The defendant, however, while admitting the widespread use of contracts made on the condition that the respective dealers would not deal in the goods of competitors, contended that the Government had to show that the actual effect of its use of the contracts was the substantial lessening of competition. The Supreme Court ruled that an actual or potential "substantial lessening" of competition is shown by proof that "competition has been foreclosed in a substantial share of the line of commerce affected."

The District Court did not find in the instant case that respondent made any sale, or contract to sell, on the condition that petitioner would not deal in the goods of a competitor. There was no finding that competition was foreclosed in any line of commerce, and no evidence or data adduced to show that competition in any line of commerce was substantially affected. There is no conflict between the instant case and the *Standard Oil* case.

From an examination of the cases cited by petitioner as being in conflict with the decisions of the Court of Appeals

in the instant case, it is apparent that no conflicts exist. Therefore, certiorari should be denied.

B. The Action of the Court of Appeals was Proper.

The second reason asserted by petitioner for the granting of a writ of certiorari rests upon the claim that the Court of Appeals erred in its interpretation of the record and in the conclusions drawn by the Court of Appeals from the evidence. (Pet. 17-19). Petitioner also asserts that the Court of Appeals erred in setting aside the District Judge's findings without stating that the court had a firm conviction that a mistake had been made. (Pet. 21). This failure on the part of the court to expressly state its firm conviction of mistake, leads petitioner to characterize the action of the Court of Appeals as granting a trial *de novo*. (Pet. 19).

Respondent agrees, and is satisfied that the Supreme Court will agree, with the Court of Appeals' interpretation of the record, and its conclusion. No contrary interpretation of the record could be reasonably made. Yet, for the purpose of this petition, it is apparent that even an admitted error by the Court of Appeals in its interpretation of the record would not constitute ground for certiorari. Assuming that the Court of Appeals erred in its interpretation of the evidence, the correction of the error would be of no general importance, would establish no guiding principle for future cases, and would resolve no conflicts or uncertainties. In short, to the extent that petitioner objects to the Court of Appeals' interpretation of the record, peti-

tioner merely seeks a rehearing. This is not the purpose of certiorari. *Layne & Co. v. Western Well Works, 261 U. S. 387, 393 (1923); Magnum Co. v. Coty, 262 U. S. 159, 163 (1923).* The Supreme Court will not grant certiorari merely to review evidence or inferences drawn from it. *General Pictures Co. v. Western Electric Co., 304 U. S. 175, 178 (1938).*

Respondent, of course, agrees that under Rule 52 of the Federal Rules of Civil Procedure the Court of Appeals had no power to grant a trial *de novo* in the instant case. Respondent also agrees that a trial court's findings of fact may not be set aside unless clearly erroneous. However, Rule 52 clearly permits and indeed requires an appellate court to review the evidence. *Reinstine v. Rosenfield, et al., 111 F. 2d 892 (C. A. 7—1940); State Farm Mutual Automobile Ins. Co. v. Bonacci, et al., 111 F. 2d 412 (C. A. 8—1940).* And, if the findings of the trial court are clearly erroneous, it is not only the normal and customary judicial procedure, but the necessary procedure, that the findings of the trial court be set aside and the judgment based upon them be reversed. *United States v. Yellow Cab Co., 338 U. S. 338, 340 (1949).*

Petitioner assails the absence of a statement that the Court of Appeals was left with a "firm conviction of mistake." The Court of Appeals in the instant case examined the evidence as it was bound to do. In its opinion it stated that it agreed with the second contention of appellant, respondent herein, which contention was that the evidence did not provide any substantial basis for the findings and that the findings, were therefore "clearly erroneous." (R.

346, 350). In view of these statements it is difficult to see how petitioner can complain that the Court of Appeals failed to have the required definite and firm conviction that a mistake was made by the District Court.

Because petitioner's claim that the Court of Appeals erred in its interpretation of the record and in the conclusions drawn from the evidence does not, if true, constitute grounds for certiorari; and because the action of the Court of Appeals, in reviewing the evidence and setting aside findings which are clearly erroneous, was not only in accordance with usual and normal appellate procedure, but was necessary in performance of its appellate function, certiorari should not be granted for the second reason suggested by petitioner.

VII.

CONCLUSION

No conflict has been shown by petitioner. Petitioner, as a predicate to the claim of a conflict with the *Ford* case, implies in his first question that respondent and another, acting pursuant to a conspiracy, refused to renew petitioner's dealer contract in order to compel him to deal with respondent. This implication was denied by the Court of Appeals as contrary to the undisputed evidence (R. 350, 351). A conflict which exists only upon the assumption that unsupported assertions are truths is no conflict at all.

To provide the basis for an asserted conflict with *Ring v. Spina* and the *Standard Oil* case, petitioner charges in his statement of the case (Pet. 7) that the acts of Hudson

Motor Car Company and the respondent were done pursuant to a national policy intended to restrain trade. Neither court made any finding even suggesting the existence of such a national policy. Again, no conflict appears.

Petitioner in his second reason for certiorari merely seeks a review of the evidence and a rehearing. This is not a proper ground for certiorari, and even admitted error by the Court of Appeals in the interpretation of evidence, would not be a sufficient basis for invoking the supervisory powers of this Court.

No conflict in judicial decisions having been shown, and no need having been shown for the exercise of the supervisory powers of this Court, and no other reason having been asserted by petitioner for granting certiorari, the petition should be denied.

Respectfully submitted,

July, 1954.

JOHN W. RUTLAND, JR.,
1801 Republic Bank Building,
1309 Main Street,
Dallas 1, Texas,
Attorney for Respondent.

Of Counsel:
DANIEL R. ROGERS,
THOMPSON, KNIGHT, WRIGHT & SIMMONS,
1801 Republic Bank Building,
1309 Main Street,
Dallas 1, Texas.

RICHARD W. LARWIN,
BEAUMONT, SMITH & HARRIS,
Ford Building,
Detroit 26, Michigan.

Receipt of a copy of Brief for Respondent opposing Application for Writ of Certiorari is hereby acknowledged, this 13th day of July, 1954.

Hobert Price

HOBERT PRICE,
Attorney for Petitioner.

APPENDIX

Title 15—United States Code Annotated

Sec. 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label of container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, Sec. 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693."

APPENDIX

Title 15—United States Code Annotated

Sec. 14. Sale, etc., on agreement not to use goods of competitor

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, Sec. 3, 38 Stat. 731."

Sec. 15. Suits by persons injured; amount of recovery

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731."

APPENDIX

Rule 52(a), Federal Rules of Civil Procedure

Rule 52. Findings by the Court

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948."